Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-2672–12 OF 2013
AZIAH ALI, ABDUL AZIZ AB RAHIM AND ZAWAWI SALLEH JJCA
31 JULY 2015

Arbitration — Award — Setting aside final award — Application for — Whether award manifestly unlawful and unconscionable — Whether arbitrator adopted proper approach in construing agreement — Whether arbitrator committed any error of law in construing agreement — Whether there was need to intervene as to method adopted by arbitrator to assess value of shares — Whether arbitrator erred in awarding pre and post award interest

The Majlis Ugama Islam Pahang ('MUIP') decided to cultivate crops on land, which had been alienated to it by the State Government of Pahang so as to generate income for itself. MUIP decided that it required the expertise of Far East Holdings Bhd ('FEH'), a company wholly owned by the State Government, which had expertise in oil palm cultivation, to develop the land as oil palm estates ('the project'). The discussions between MUIP and FEH culminated in an agreement between the two parties and Kampong Aur Oil Palm (Co) Sdn Bhd ('KAOP'), a wholly owned subsidiary of FEH. By way of the agreement MUIP, FEH and KAOP agreed that a developer company would be incorporated as the vehicle to carry out the project. Accordingly a wholly owned company called Madah Perkasa Sdn Bhd ('MPSB') was incorporated and the land was registered in the name of MPSB. MUIP was then allotted 8,218,033 units of shares in MPSB as consideration for the land. After the said allotment, the shareholding structure was such that FEH held 67% of the shares in MPSB and MUIP held the remaining 33%. Under the agreement MUIP was also given two options to acquire additional shares in KAOP so that it would ultimately own 60% of the shares in KAOP. However, at a board meeting on 10 April 1997, the directors of KAOP agreed to increase the paid up capital of KAOP and also approved the issuance of 22,096,868 additional shares in KAOP to FEH. A dispute arose between the parties over the allotment of the additional shares in KAOP to FEH, which led MUIP to file a suit against FEH and KAOP. By this suit MUIP contended that the allotment of the additional shares to FEH was an unlawful act that was not in accordance with the agreement because it had the effect of diluting MUIP's shareholding in KAOP and it was made without making an offer to MUIP to purchase a proportion of the increased paid up capital, as per the terms of the first option. At the same time MUIP gave notice to exercise its second option under the agreement to acquire 11% of FEH's shares in KAOP but FEH had refused to

comply with the terms of the agreement. Thus by this suit MUIP prayed, inter alia, for a declaration that the allotment of the additional shares by KAOP to FEH was null and void; that the court appoint an independent valuer to value the assets of KAOP and fix the price per unit of share in KAOP; damages and costs. Both FEH and KAOP applied for and obtained an order to stay proceedings in the High Court on the grounds that disputes, which arose from the interpretation of clauses in the agreement should be referred to arbitration. In the arbitration proceedings, MUIP argued that according to the agreement the change in equity of KAOP should be with the consent of MUIP and FEH. Since the allotment of the new shares to FEH was without MUIP's consent, it was MUIP's contention that the allotment was a fundamental breach of the agreement and ought to be cancelled. FEH argued that the agreement did not prohibit FEH from increasing the paid up capital of KAOP. FEH also contended that MUIP had knowledge of the proposal because it had two representatives on the Board of KAOP, who had agreed to the proposed increase in the authorised capital of KAOP. The arbitrator decided in favour of MUIP in that he, inter alia, cancelled the allotment of additional shares in KAOP to FEH and awarded damages of RM77,808,207.80 to MUIP with pre and post award interest. Both FEH and KAOP filed an originating summons ('OS') to challenge the final award while MUIP filed an OS application to register the final award. Being related matters, both applications were heard together by the High Court judge. The High Court judge found that the arbitrator had not erred in law and that his findings of fact ought not to be disturbed. At the same time the judge found that the arbitrator had erred in awarding pre and post award interests to MUIP. Consequently the High Court judge dismissed the application by FEH and KAOP except on the award of interests and allowed the application by MUIP to register the final award except on the award of interest. Hence the present two appeals filed by FEH and KAOP and the third appeal by MUIP. In their appeals both FEH and KAOP submitted that the final award ought to be set aside under s 42 of the Arbitration Act 2005 ('the Act') on the grounds that it was manifestly unlawful and unconscionable and the decision of the arbitrator was perverse. MUIP appealed against the decision of the High Court judge to set aside the pre and post award interests awarded to it by the arbitrator.

Held, dismissing the appeals with costs:

(1) After perusing the final award it was clear that the approach adopted by the arbitrator in construing the agreement was proper as it was consonant with case law. In fact, the business common sense approach that was used to construe the agreement was appropriate because the dispute between the parties arose out of a commercial contract. Thus, the High Court judge was correct in finding that the arbitrator had not committed any error of law in construing the agreement (see paras 43–44).

(2) The arbitrator was right in finding that it was the contemplation of the contracting parties that ultimately MUIP should own 60% of the shares in KAOP after having exercised the two options. The agreement had made no provision for any change in the paid up capital or authorised capital of KAOP. Therefore any such change subsequent to the execution of the agreement ought to be with the consent of the contracting parties particularly when such change would have an adverse consequence on any one of the contracting parties, as is the case in the present appeal. In effect, the decision of FEH made without the knowledge or consent of MUIP had thrown into disarray the intention underlying the agreement that ultimately MUIP will own 60% shares in KAOP. Thus, although FEH and KAOP could increase their authorised and paid up capital, such action had to be circumscribed by any legal or contractual restraints that they had with third parties. This fact was correctly acknowledged by the arbitrator in his final award. Thus, there was no need to intervene with the arbitrator's construction of the agreement (see paras 92–93).

(3) There was also no reason to intervene with the arbitrator's approach to assess the value of KAOP's shares as he had decided on the method after careful consideration of the evidence before him (see paras 94–95).

(4) On the issue of damages and losses payable by FEH to MUIP, it was clear that the arbitrator had made his decision on these matters after having carefully considered the evidence adduced before him, both oral and documentary, as well as the submissions of the parties. Thus, there was no grounds to find the final award to be manifestly unlawful and unconscionable or perverse. The arbitrator had not committed any error of law except on the award of pre and post award interest (see paras 96–97).

(5) Under s 33(6) of the Act, there was specific provision for post award interest only. Clearly the Act did not contemplate the awarding of pre-award interest. When the Act specifically provides for post award interest but is silent on pre-award interest, then implicitly the legislature did not intend to confer on an arbitrator the power to award pre award interest. Therefore, the High Court judge was right to set aside the award of pre award interest. As for post award interest, it was not disputed that MUIP had not pleaded for such interest. Since parties were bound by their pleadings, the arbitrator should not have awarded post award interest to MUIP. The High Court judge was correct in setting aside the post award interest (see paras 47-48).

[Bahasa Malaysia summary

Majlis Ugama Islam Pahang ('MUIP') memutuskan untuk menanam tanaman di atas tanah, yang telah diberi milik kepadanya oleh Kerajaan Negeri Pahang bagi menjana pendapatan untuk dirinya sendiri. MUIP memutuskan bahawa

ia memerlukan kepakaran Far East Holdings Bhd ('FEH'), sebuah syarikat yang dimiliki sepenuhnya oleh Kerajaan Negeri, yang mempunyai kepakaran dalam penanaman kelapa sawit, untuk membangunkan tanah itu sebagai ladang kelapa sawit ('projek'). Perbincangan antara MUIP dan FEH berakhir dengan perjanjian antara kedua-dua pihak dan Kampong Aur Oil Palm (Co) Sdn Bhd ('KAOP'), anak syarikat milik penuh FEH. Melalui perjanjian MUIP itu, FEH dan KAOP bersetuju bahawa syarikat pemaju akan dimasukkan sebagai badan untuk menjalankan projek. Oleh itu, syarikat milik penuh yang dikenali sebagai Madah Perkasa Sdn Bhd ('MPSB') telah diperbadankan dan tanah itu telah didaftarkan atas nama MPSB. MUIP kemudiannya diperuntukkan 8,218,033 unit saham dalam MPSB sebagai balasan bagi tanah itu. Selepas peruntukan tersebut, struktur pegangan saham adalah seperti yang FEH memegang 67% saham dalam MPSB dan MUIP memegang baki 33% itu. Di bawah perjanjian MUIP juga telah diberi dua pilihan untuk membeli saham tambahan dalam KAOP supaya ia akhirnya akan memiliki 60% saham dalam KAOP. Walau bagaimanapun, pada mesyuarat lembaga pada 10 April 1997, para pengarah KAOP bersetuju untuk meningkatkan modal berbayar KAOP dan juga meluluskan pengeluaran 22,096,868 saham tambahan dalam KAOP untuk FEH. Pertikaian timbul antara pihak-pihak atas peruntukan bagi saham tambahan dalam KAOP untuk FEH, yang membawa MUIP untuk memfailkan saman terhadap FEH dan KAOP. Melalui guaman ini MUIP menegaskan bahawa peruntukan saham tambahan untuk FEH adalah satu tindakan menyalahi undang-undang yang tidak mengikut perjanjian ini kerana ia mempunyai kesan mencairkan pegangan saham MUIP dalam KAOP dan ia dibuat tanpa membuat tawaran kepada MUIP untuk membeli bahagian modal berbayar meningkat, mengikut syarat-syarat pilihan pertama. Pada masa yang sama MUIP memberi notis melaksanakan pilihan kedua di bawah perjanjian untuk memperoleh 11% saham FEH dalam KAOP tetapi FEH enggan mematuhi syarat-syarat perjanjian itu. Oleh itu, melalui guaman MUIP ini memohon antara lain bagi suatu perisytiharan bahawa peruntukan saham tambahan dengan KAOP kepada FEH adalah batal dan tidak sah; bahawa mahkamah melantik penilai bebas untuk menilai aset KAOP dan menetapkan harga seunit saham di KAOP; ganti rugi dan kos. Kedua-dua FEH dan KAOP memohon dan memperoleh perintah untuk menggantung prosiding di Mahkamah Tinggi atas alasan bahawa pertikaian, yang timbul dari tafsiran fasal dalam perjanjian itu hendaklah dirujuk kepada timbang tara. Dalam prosiding timbang tara, MUIP berhujah bahawa mengikut perjanjian perubahan dalam ekuiti KAOP harus dengan persetujuan MUIP dan FEH. Memandangkan peruntukan untuk saham baru untuk FEH adaah tanpa kebanaran MUIP, ia adalah hujahan MUIP bahawa peruntukan adalah asas pelanggaran kontrak dan sepatutnya dibatalkan. FEH menghujahkan bahawa perjanjian tidak menghalang FEH daripada meningkatkan modal berbayar KAOP. FEH juga menegaskan bahawa MUIP mempunyai pengetahuan cadangan tersebut kerana ia mempunyai dua wakil Lembaga KAOP, yang telah bersetuju kepada peningkatan yang dicadangkan dalam modal dibenarkan

KAOP. Penimbang tara memutuskan berpihak kepada MUIP yang mana dia, antara lain, membatalkan peruntukan saham tambahan dalam KAOP kepada FEH dan mengawardkan ganti rugi sebanyak RM77,808,207.80 kepada MUIP dengan award faedah sebelum dan selepas. Kedua-dua FEH dan KAOP memfailkan saman pemula untuk mencabar award muktamad manakala MUIP memfailkan permohonan saman pemula untuk mendaftarkan award muktamad. Memandangkan ia perkara yang berkaitan, kedua-dua permohonan didengar bersama oleh hakim Mahkamah Tinggi. Hakim Mahkamah Tinggi mendapati bahawa penimbang tara tidak terkhilaf dalam undang-undang dan bahawa dapatannya terhadap fakta tidak sepatutnya diusik. Pada masa yang sama hakim mendapati bahawa penimbang tara terkhilaf dalam mengawardkan award faedah sebelum dan selepas kepada MUIP. Akibatnya hakim Mahkamah Tinggi menolak permohonan oleh FEH dan KAOP kecuali terhadap award faedah dan membenarkan permohonan oleh MUIP untuk mendaftarkan award muktamad kecuali award faedah. Maka kedua-dua rayuan difailkan oleh FEH dan KAOP dan rayuan ketiga oleh MUIP. Dalam rayuan meraka kedua-dua FEH dan KAOP mengemukakan bahawa award muktamad sepatutnya diketepikan di bawah s 42 Akta Timbang Tara 2005 ('Akta') atas alasan bahawa ia jelas menyalahi undang-undang dan tidak berpatutan dan keputusan penimbang tara adalah terkhilaf. MUIP merayu terhadap keputusan hakim Mahkamah Tinggi untuk mengenepikan faedah award sebelum dan selepas diawardkan kepadanya oleh penimbang tara.

Diputuskan, menolak rayuan dengan kos:

(1) Selepas meneliti award akhir adalah jelas bahawa pendekatan yang diguna pakai oleh penimbang tara dalam mentafsirkan perjanjian itu adalah betul kerana ia adalah konsonan dengan undang-undang kes. Malah, pendekatan biasa perniagaan yang sama yang telah digunakan untuk mentafsirkan perjanjian itu adalah wajar kerana pertikaian antara pihak-pihak yang timbul daripada kontrak komersial. Oleh itu, hakim Mahkamah Tinggi adalah betul dalam mendapati bahawa penimbang tara itu tidak melakukan apa-apa kesilapan undang-undang dalam mentafsirkan perjanjian (lihat perenggan 43–44).

(2) Penimbang tara adalah betul dalam mendapati bahawa ia adalah dibawah pertimbangan pihak yang berkontrak bahawa akhirnya MUIP hendaklah memiliki 60% saham dalam KAOP setelah menjalankan dua pilihan. Perjanjian ini telah tidak membuat apa-apa peruntukan bagi apa-apa perubahan dalam modal berbayar atau modal KAOP dibenarkan. Oleh itu apa-apa perubahan selepas pelaksanaan perjanjian yang sepatutnya dengan persetujuan pihak yang berkontrak terutamanya apabila perubahan itu akan memberi kesan buruk ke atas mana-mana satu pihak yang berkontrak, seperti yang berlaku dalam kes rayuan ini. Pada hakikatnya, keputusan FEH dibuat tanpa pengetahuan atau

persetujuan MUIP telah dibuang ke dalam keadaan kucar-kacir niat yang mendasari perjanjian itu yang akhirnya MUIP akan memiliki 60% saham dalam KAOP. Oleh itu, walaupun FEH dan KAOP boleh meningkatkan mereka dibenarkan dan berbayar, tindakan itu terpaksa dihadkan oleh apa-apa sekatan undang-undang atau kontrak yang mereka ada dengan pihak ketiga. Fakta ini diakui betul oleh penimbang tara dalam award muktamadnya. Oleh itu, tidak ada keperluan untuk campur tangan dengan pembinaan perjanjian penimbang tara (lihat perenggan 92–93).

(3) Juga terdapat tiada sebab untuk campur tangan dengan pendekatan penimbang tara untuk menilai nilai saham KAOP kerana dia telah memutuskan kaedah selepas memberikan pertimbangan wajar keterangan di hadapannya (lihat perenggan 94–95).

(4) Mengenai isu ganti rugi dan kerugian yang perlu dibayar oleh FEH kepada MUIP, ia adalah jelas bahawa penimbang tara telah membuat keputusan mengenai perkara-perkara ini setelah menimbangkan dengan teliti keterangan yang dikemukakan di hadapannya, kedua-dua lisan dan dokumentari, serta penghujahan pihak-pihak. Oleh itu, tidak ada alasan untuk mendapati award muktamad menjadi jelas menyalahi undang-undang dan tidak berpatutan atau salah. Penimbang tara tidak melakukan apa-apa kesilapan undang-undang kecuali atas faedah award sebelum dan selepas (lihat perenggan 96–97).

(5) Di bawah s 33(6) Akta, terdapat peruntukan tertentu bagi faedah award selepas sahaja. Jelas sekali Akta tidak memikirkan pemberian faedah award sebelum. Apabila Akta khususnya mempunyai peruntukan bagi kepentingan award selepas tetapi senyap tentang kepentingan award sebelum, maka secara tersirat badan perundangan tidak berniat untuk memberikan kepada penimbang tara kuasa untuk award faedah sebelum award. Oleh itu, hakim Mahkamah Tinggi adalah betul untuk mengenepikan award faedah award sebelum. Bagi kepentingan award selepas, ia tidak dipertikaikan bahawa MUIP tidak memplid untuk kepentingan itu. Oleh kerana pihak-pihak terikat dengan pliding mereka, penimbang tara itu tidak sepatutnya memberikan kepentingan award selepas kepada MUIP. Hakim Mahkamah Tinggi adalah betul dalam mengetepikan kepentingan award selepas (lihat perenggan 47–48).]]

Notes

For cases on award in general, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1786–1995.

Cases referred to

Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & Another Appeal [2013] 2 CLJ 395, CA (refd)
Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd [2011] 4 MLJ 52, CA (refd)
Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd [2013] 1 LNS 1470; [2014] 1 AMR 253, HC (folld)
Geogas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)
Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401; [2004] 1 CLJ 743, FC (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (folld)
Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd [2015] 1 CLJ 617, CA (refd)
Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766; [2011] 3 AMR 315, HC (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)
The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)
The Law Land Company Ltd v Consumers' Association Ltd [1980] 2 EGLR 109, CA (refd)
Sanlaiman Sdn Bhd v Kerajaan Malaysia [2013] 3 MLJ 755; [2013] 2 AMR 523, HC (refd)
Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd [2007] 3 SLR 86, CA (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210; [1969] 1 LNS 172 (refd)
Weardale Coal and Iron Co v Hodson [1894] 1 QB 598, CA (refd)

Legislation referred to

Administration of Islamic Law Enactment 1991 s 4
Arbitration Act 2005 ss 30(1), (5), 33(6), 38, 37(1)(a)(iv), (b)(ii), (v), 37(2)(b) , 42, 42(1), (2), (2)(b), (c), (d)
Civil Law Act 1956 s 11
Companies Act 1965
Contracts Act 1950 ss 74(1), (2)

Appeal from: Originating Summons No 24NCC(ARD)-46–11 of 2012 (High Court, Kuala Lumpur)

Cyrus Das (Lam Ko Luen, Mohamed Noor Mahmood and Lee Lyn-Ni with

him)(Mohamed Noor, Amran & Yoon) for the applicant.
Thangaraj (Syed Nasarudin Syed Abd Hadi and R Archana with him) (Radzi & Abdullah) for the respondent.

Aziah Ali JCA:

INTRODUCTION

[1] There are three related appeals involving three parties heard before us. It is appropriate that we begin by first setting out the particulars of the parties and the appeals.

THE PARTIES

[2] Far East Holdings Bhd is a company wholly owned by the State Government of Pahang ('the State Government'). Kampong Aur Oil Palm (Co) Sdn Bhd is a wholly owned subsidiary of Far East Holdings Bhd.

[3] Majlis Ugama Islam Dan Adat Resam Melayu Pahang is a body corporate established under s 4 of the Administration of Islamic Law Enactment 1991 ('the Enactment').

[4] For ease of reference, we will refer to Far East Holdings Bhd as 'FEH', Kampong Aur Oil Palm (Co) Sdn Bhd as 'KAOP' and Majlis Ugama Islam Dan Adat Resam Melayu Pahang as 'MUIP'.

THE APPEALS

[5] FEH and KAOP are the appellants in Civil Appeal No W-02(NCC)(A)-2671–12 of 2013 and Civil Appeal No W-02(NCC)(A)-2672–12 of 2013. MUIP is the respondent in both the appeals. Conversely, in Civil Appeal No W-02(NCC)(A)-2781–12 of 2013 MUIP is the appellant and both FEH and KAOP are the respondents.

Civil Appeal No W-02(NCC)(A)-2671–12 of 2013

[6] Civil Appeal No W-02(NCC)(A)-2671–12 of 2013 ('Appeal 2671') is an appeal by FEH and KAOP against the decision of the High Court allowing the application made by MUIP vide Originating Summons No 24NCC(ARB)-54–11 of 2012 ('OS54') under s 38 of the Arbitration Act 2005('the Act') to register a final award made in arbitration proceedings in which MUIP was the claimant and FEH and KAOP were the respondents.

Civil Appeal No W-02(NCC)(A)-2672–12 of 2013

[7] Civil Appeal No W-02(NCC)(A)-2672–12 of 2013 ('Appeal 2672') is the appeal by FEH and KAOP against the decision of the High Court to dismiss their application made vide Originating Summons No 24NCC(ARB)-46–11 of 2012 ('OS46') pursuant to s 42(1) and (2) of the Act to determine questions of law arising out of the final award, and alternatively to set aside the final award pursuant to s 37(1)(a)(iv), (v) and (b)(ii) and s 37(2)(b) and s 30(1) and (5) of the Act.

Civil Appeal No W-02(NCC)(A)-2781–12 of 2013

[8] Civil Appeal No W-02(NCC)(A)-2781–12 of 2013 ('Appeal 2781') is the appeal by MUIP against the decision of the High Court to set aside the pre and post award interests awarded by the arbitrator to MUIP.

[9] At the commencement of the appeals, it was agreed that submissions will commence in respect of Appeal 2672, which is the main appeal, and the submissions made in respect of the main appeal will apply equally to the other two appeals.

BACKGROUND FACTS

[10] Before we delve into the appeals, we set out below the salient background facts:

(a) MUIP needed funds to carry out its functions and objectives under the Enactment. At the material time, the source of funds for MUIP was *zakat* collections and *Baitulmal*;

(b) MUIP then decided that it had to have sufficient and independent source of funds and not be dependent on the State Government for financial support;

(c) MUIP had requested the State Government to alienate a piece of land for the cultivation of commercial crops to generate revenue for MUIP;

(d) the State Government had approved the alienation of 11,073 acres of land ('the alienated land') to MUIP;

(e) however, MUIP did not have the experience or expertise to cultivate oil palm and needed to engage a third party with the financial capability and experience to develop the alienated land as oil palm estates ('the project');

(f) MUIP then entered into a discussion with FEH which has expertise in oil palm cultivation;

(g) KAOP, the wholly owned subsidiary of FEH owns 5,000 acres of cultivated oil palm land which was already being harvested;

(h) the discussions culminated in an agreement between MUIP, FEH and KAOP dated 16 January 1992 ('the agreement');

(i) it was agreed that the purchase consideration for the alienated land is RM10,929,983;

(j) it was also agreed that KAOP was to establish a developer company as the vehicle to carry out the Project. KAOP then incorporated a wholly owned company called Madah Perkasa Sdn Bhd ('MPSB') as the developer company;

(k) the alienated land was to be registered in the name of MPSB;

(l) cl 2.02(a) of the agreement provides that upon the alienated land being registered in the name of MPSB, KAOP will allot 8,218,033 units of shares to MUIP as consideration for the alienated land;

(m) after the said allotment under cl 2.02(a), the shareholding structure of KAOP is as follows:

Name	Total Shares	Percentage
FEH	16,685,099	67
MUIP	8,218,033	33
Total	24,903,132	100

(n) on 19 April 1999 the alienated land was duly registered in the name of MPSB;

(o) cl 2.02 of the agreement gives to MUIP two options to acquire additional shares in KAOP;

(p) cl 2.02(b) of the agreement gives to MUIP or its nominee the first option to acquire 3,984,501 or 16% of the shares of FEH in KAOP at RM1.33 per share totaling RM5,299,386.33;

(q) the first option was exercisable within two years from the date approval from the State Authority was obtained;

(r) cl 2.02(e) gives to MUIP a second option to acquire another 2,739,344 or 11% of FEH's shares in KAOP;

(s) the second option was exercisable within three years from the fifth year after the relevant approvals were obtained;

(t) the price of the shares to be acquired under the second option is to be decided by negotiations; and

(u) upon the exercise of the two options, MUIP will ultimately own 60% shares in KAOP.

[11] FEH had advanced a loan of RM22.09m to KAOP to fund the project.

[12] At a meeting on 10 April 1997, the Board of Directors of KAOP agreed to increase the authorised capital of KAOP from 30,000,000 shares to 50,000,000 with the issuance of 20,000,000 new shares at RM1 each. The board also agreed to increase the paid up capital of KAOP from 16,685,009 to 47,000,000 by the issuance of 30,394,901 ordinary shares at RM1 per share. The board had also approved the issuance of 22,096,868 additional shares in KAOP to FEH.

[13] It was the dispute over the allotment of the 22,096,868 new shares to FEH that led MUIP to file Originating Summons No MT1-24–263 of 2006 ('OS263') at the Kuantan High Court.

Originating Summons No MT1-24–263 of 2006

[14] By this suit, MUIP as the plaintiff had contended, amongst others, that:

(a) the allotment of the additional 22,096,868 shares to FEH had the effect of diluting MUIP's shareholding in KAOP from 33% to 17% and, it was made without making an offer to MUIP to purchase a proportion of the increased paid up capital. Such act is unlawful or not in accordance with the agreement;

(b) MUIP had satisfied all conditions for the exercise of the first option but FEH had failed to transfer the 16% shares in KAOP to MUIP; and

(c) MUIP had, by letters dated 1 September 2004 and 8 September 2004, given notice to FEH of its intention to exercise the second option, but FEH had refused to comply with the terms of the agreement to fix a price for the purchase of the shares. Further, FEH had unilaterally appointed Aftaas Corporation Advisory Services Sdn Bhd ('AFTAAS') to value the shares and FEH had unilaterally fixed the price of the shares at an exorbitant price.

Therefore, MUIP prays for, amongst others, the following:

(a) a declaration that the allotment of the additional 22,096,868 shares to FEH by KAOP is null and void;

(b) a declaration that MUIP had exercised the two options under cl 2.02 of the agreement;

(c) that the court appoints an independent accountant and/or valuer to value the assets of KAOP and MPSB as at 1 September 2004 and to fix the price per unit of share in KAOP;

(d) that damages suffered by MUIP and all payments and dividends that are payable by FEH and KAOP arising from the change in the shareholding in KAOP to be assessed by the senior assistant registrar and to be paid by FEH to MUIP;

(e) costs; and

(f) such other reliefs as the court deems fit.

[15] Both FEH and KAOP then obtained an order to stay proceedings at the High Court on the ground that the dispute arose from the interpretation of clauses in the agreement relating to the first and second options and must therefore be referred to arbitration (cl 5.01(f) of the agreement).

ARBITRATION

[16] Tuan Hj Mohd Rasheed Khan Mohd Idris ('the arbitrator') was appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration to be the arbitrator. Arbitration proceedings commenced and FEH/KAOP called two witnesses and MUIP called two witnesses. The proceedings concluded on 14 December 2011 and culminated in the final award.

[17] Briefly, MUIP contended that the agreement expressly provides that the share capital of KAOP is fixed at 24,903,132 shares and after the alienated land had been transferred to MPSB, FEH should own 16,685,099 shares (67%) and MUIP to own 8,218,033 shares (33%) shares in KAOP. The change in equity of KAOP must be with MUIP's and FEH's consent. The allotment of the 22,096,868 new shares to FEH was without MUIP's consent. The allotment is against the spirit of the agreement and is a fundamental breach of the agreement and ought to be cancelled.

[18] FEH on the other hand relied on recital 3 of the agreement and contended that the agreement does not prohibit FEH from increasing the paid up capital of KAOP. Further it is contended that MUIP had knowledge of the proposal because it has two representatives on the board of KAOP who were present at the board meeting on 10 April 1997 where the board agreed to increase the authorised capital of KAOP from 30,000,000 shares to 50,000,000 shares with the issuance of 20,000,000 new shares. The board had also agreed to increase the paid up capital of KAOP from 16,685,009 ordinary shares to 47,000,000 ordinary shares. The proposed increase in the authorised capital of KAOP had been tabled and approved by the Annual General Meeting of KAOP. Therefore MUIP was bound by the actions of its two representatives.

[19] MUIP however contended that the presence of the two representatives cannot be construed as giving consent or taking decision on behalf of MUIP because MUIP had not delegated such power to any person or committee.

DECISION OF THE ARBITRATOR

[20] The arbitrator decided in favour of MUIP and handed down an award in total value of RM97m which included damages and interests for both pre and post the award. The gist of the decision is as follows:

(a) the allotment of the additional 22,096,868 shares to FEH is cancelled;

(b) FEH to pay damages to MUIP amounting to RM77,808.207.80 for loss of dividends up to year 2010;

(c) MUIP was allowed to exercise the first option;

(d) the right of MUIP to exercise the second option is still valid and subsisting and the price of the second option is set at RM5.3244 per share amounting to RM14,585,363.20;

(e) pre-award interest at 4%pa;

(f) post award interest at 4%pa from the date of the final award; and

(g) costs of RM150,000 to be paid by FEH and KOAP to MUIP.

[21] Notwithstanding the provision of cl 5(f) of the agreement which states that the decision of the arbitrator shall be final and binding on the parties, both FEH and KAOP filed OS46 to challenge the final award. MUIP on the other hand had filed OS54 to register the final award. Being related matters, both applications were heard together by the learned High Court judge.

OS46

[22] By OS46, FEH and KAOP had sought for the following reliefs:

(a) That this Honourable Court do determine the following questions of law arising out of a final award dated 19 September 2012 ('the award') made by Hj Mohd Rasheed Khan bin Mohd Idris ('the arbitrator') in an arbitration proceeding concerning the plaintiffs and the defendant pursuant to s 42(1) and (2) of the Arbitration Act 2005:

(i) as regards the increase in the paid up capital of the second plaintiff:

(A) whether the arbitrator was correct in law in striking down the allotment of the additional shares of 22,096,868 from the increase in the paid up capital in the second plaintiff when such decision was made by the directors and shareholders of the second plaintiff without regard to the fact that the first plaintiff and the second plaintiff are separate legal entities?

(B) whether the arbitrator was correct in law in failing to conclude that the defendant's nominee directors on the board of the second plaintiff could validly bind the defendant in the stand

they took in failing to object to the new allotment of shares?

(C) whether the arbitrator was correct in law in holding that the failure of the plaintiffs to plead limitation deprived the plaintiffs of its defence that the defendant's objection on the allotment of 22,096,868 additional shares to the first plaintiff is an afterthought?

(D) whether the arbitrator was correct in law in holding that the burden lies on the plaintiffs to call the defendant's nominees as witnesses and consequently, drawing an adverse inference against the plaintiffs for not calling them?

(E) whether the arbitrator in deciding if there was a breach of the agreement ought to specifically construe the agreement based on its written terms and within the four corners of the agreement without basing it on extraneous factors?

(ii) as regards the first option:

(A) whether the arbitrator was correct in law in failing to hold that timeliness for exercise of an option in a purely commercial contract must be construed strictly?

(B) whether the arbitrator should not in law have held, as regard to the imposition of time limit for exercise of the option, that an exercise of the option outside the stipulated time period is invalid in law?

(C) whether the arbitrator was correct in law in not holding that the exercise of an option to purchase shares in a purely commercial transaction without the tender of the purchase price was invalid or *non est* in law?

(D) whether the arbitrator was correct in law in failing to conclude that the burden of acting within the stipulated time to exercise an option fell on the option-holder and not on the option-giver?

(iii) as regards the second option:

(A) whether the arbitrator was correct in law in failing to conclude that timeliness for exercise of an option to purchase shares in a purely commercial contract was strict and the right to exercise the option lapsed once time has run?

(B) whether the arbitrator should not have held in law that the second option was void and unenforceable unless price was agreed within the stipulated time?

(C) whether the arbitrator erred in law in failing to hold that the burden of complying with all the terms for exercise of the option lay with the option-holder and that if the option-holder failed to take the requisite steps within the stipulated time, the option lapsed?

(D) the arbitrator should have held in law that since price was not agreed between the parties within the stipulated time or at all, the option had lapsed?

(E) whether the arbitrator was correct in law in rejecting the share valuation report presented by the first plaintiff when the option clause envisaged a price based on the current asset value of the assets of the second plaintiff?

(F) whether the arbitrator had acted validly in law in treating the option period as still open for exercise when there was no agreement on price and when the terms of the option clause had not been fulfilled by the defendant?

(iv) as regards the award of damages for the breach:

(A) whether the arbitrator was correct in law when he made an order to set off the damages against the costs of exercising the first and second options?

(B) whether the arbitrator was correct in law when he ordered the first plaintiff to pay the defendant damages amounting to RM97,692,957?

(v) as regards the award of interest:

(A) whether the arbitrator could in law award pre-award interest and post-award interest when the defendant did not specifically plead for the same in the statement of claim and the plaintiffs object to such award?

(b) that consequently, the award be set aside or alternatively, be varied or in the further alternative, be remitted together with the High Court's determination on the aforesaid questions of law to the arbitrator for reconsideration pursuant to s 42(2)(b), (c) or (d) of the Arbitration Act 2005;

(c) and/or alternatively, that the award be set aside pursuant to s 37(1)(a)(iv), (v) and (b)(ii) and s 42(2)(b) and s 42(2)(b) of the Arbitration Act 2005;

(d) that costs of and incidental to this application be borne by the defendant; and

(e) such further or other relief and/or directions as deemed fit by this honourable court.

DECISION OF THE HIGH COURT

[23] Briefly, having considered the final award, the learned judge found that the arbitrator has not erred in law in taking an objective approach in

ascertaining the intention of the parties. The arbitrator had made findings of fact which the court ought not to disturb.

[24] In respect of damages, the learned judge found that the arbitrator had not made any error on law since the claim was premised on a breach of contract.

[25] On the issue of interest, the learned judge had noted that the Act did not provide for pre award interest but does provide for post award interest. But MUIP had not pleaded for any interests. The learned judge found that the arbitrator had exceeded his jurisdiction in allowing pre award interests. The arbitrator had also erred in allowing post award interest when MUIP had not pleaded for the same. Therefore, the learned judge set aside both the pre and post award inetrests awarded by the arbitrator.

[26] Consequently, the learned judge dismissed OS46 and allowed OS54 except on the award of interests. Hence, Appeals 2671 and 2672 filed by FEH and KAOP, and Appeal 2781 filed by MUIP.

[27] We now revert to the appeals before us.

THE APPEAL

[28] Before us, the learned counsel for FEH and KAOP submitted that this court ought to intervene to set aside the final award under s 42 of the Act as the final award is manifestly unlawful and unconscionable and the decision of the arbitrator is perverse.

[29] Section 42 provides as follows:

> Any party may refer to the High Court any question of law arising out of an award.
>
> The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.
>
> A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

[30] Learned counsel urged this court to adopt the guidelines (though not necessarily exhaustive) as proposed by Mohamad Ariff JCA (as he then was) in the case of *Kerajaan Malaysia v Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 regarding the approach to be adopted by a court in determining a reference on a question of law arising out of an arbitral award under s 42 of the Act. At para 57 of the judgment, Ariff JCA listed down ten guidelines as follows:

(a) the question of law must be identified with sufficient precision;

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally;

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law;

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties;

(g) this jurisdiction under s 42 is not to be lightly exercised, and should be exercised only in clear and exceptional;

(h) nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence; and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[31] The learned counsel for MUIP submitted that the court should take a limited view of its jurisdiction under s 42 of the Act (*Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766; [2011] 3 AMR 315). It is submitted that findings of fact are solely within the purview of the arbitrator and there is no ground to show that the final award is either manifestly unlawful and unconscionable or that the decision of the arbitrator is perverse.

[32] Learned counsel referred us to, amongst others, the case of *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 in support of submissions that the court should be slow in interfering with an arbitral award and that the scope of the court's jurisdiction to set aside an award is a narrow one. In that case, Ramly Ali JCA (as he then was) said amongst others that 'the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and refrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the Arbitration Act 2005 which is for

all intent and purpose to promote one-stop adjudication in line with the international practice ... '.

[33] We also wish refer to the case of *Exceljade Sdn Bhd v Bauer (Malaysia) Sdn Bhd* [2013] 1 LNS 1470; [2014] 1 AMR 253, an authority cited by counsel for the parties. In that case Nallini Pathmanathan J, (as she then was) had commendably dealt with issues relating to s 42, and amongst others, on whether findings of fact made by an arbitrator are open to review or consideration.

[34] Her Ladyship referred to the judgment of Steyn J in the English case of The *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215 as follows:

> *... This is an appeal under* s 1 Arbitration Act 1979 *of the on a question of law arising from an arbitration award.*
>
> *For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. This is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrator's award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact ...'*

[35] Nallini J also referred to the various attempts made to circumvent the rule that the arbitrator's findings of fact are conclusive, as enumerated by Steyn J in his judgment, which did not find favour with the court, such as, that:

(a) an obvious mistake of fact by the arbitrators may constitute misconduct;

(b) an obvious mistake of fact might well amount to an excess of jurisdiction;

(c) the question whether there is evidence to support the arbitrator's findings of fact is itself a question of law; or

(d) there were inconsistencies in the arbitrator's findings of fact.

[36] The case of *The Baleares* articulates the non-interventional approach adopted by the courts in relation to findings of fact by arbitrators. In her judgment, Nallini J aptly summarised the caution sounded in the said case that '*... it is contrary to well-established principle for the court to draw inferences from*

findings of fact in an award on the basis that it would be reasonable to do so. The only inferences which a court might be able to draw from an arbitrator's findings of fact are those which are beyond rational argument. Even in such an instance, it was cautioned that it was not clear that the court was entitled to draw inferences of fact from the facts set out in the award. In short the courts are to be constantly vigilant to ensure that attempts to question the arbitrators' findings of fact are rejected. To this end the courts should decline to interfere when questions of fact are dressed up as questions of law.'.

[37] The judgment by the Singapore Court of Appeal in *Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte Ltd* [2007] 3 SLR 86 also reflects the policy of minimal intervention by the courts. In its judgment, the court said that this policy is underpinned by two principal considerations:

(a) there is a need to recognise the autonomy of the arbitral process by encouraging finality, so its advantage as an efficient alternative dispute resolution process is not undermined; and

(b) having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts.

The court went on to say that:

> It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

[38] Thus on the authorities, it is clear that in applications made under s 42 of the Act, errors by an arbitrator such as drawing wrong inferences of fact from the evidence before him, be it oral or documentary, is in itself not sufficient for the setting aside of an award (*Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743). Likewise, the suggestion that the arbitrator has misapprehended and misunderstood the evidence presented is also not a sufficient ground to set aside an arbitral award (*Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172). The court also does not and should not sit in appeal and examine the correctness of the award on merits (*Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788 (CA). The instances we state here are not in the least intended to be exhaustive.

[39] We are, however, mindful that it is a fundamental principle of law that an arbitral award that is tainted with illegality can be challenged and may be set aside by the courts on the ground that an error of law has been committed. In the case of *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011]

6 MLJ 441; [2012] 3 CLJ 423, the Federal Court said, amongst others, that all matters regarding the construction of a document is a question of law and is thus a specific reference. Therefore it is necessary for the appellant to show illegality. The Federal Court said as follows (para 33):

> In our view the Supreme Court in *Ganda Edibile* and the Federal Court *Intelek Timur* did not introduce any new ground for challenge. Both cases merely reiterated a fundamental principle of law, to wit, that if a decision of an arbitrator is tainted with illegality, it is always open for challenge. Thus, even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by the courts on the ground that an error of law had been committed. It must be stressed here that the award must be tainted with some sort of illegality. It must also be emphasised that the word 'may' is used here, in that the award may be set aside. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it.

Further in para 34, the court said:

> ... the Supreme Court in *Ganda Edibile* did state that construction is, generally speaking, a question of law. In our view all matters regarding the construction of a document is a question of law. It may very well be that in some cases, other matters are brought up for consideration which may involve questions of fact, but where the matter solely referred to is the construction of a document, it must be said to be solely a question of law ...

And in para 44 of the judgment, the court also said:

> In this case it is not in dispute that the matter referred for arbitration is one of construction of the terms in the PSC, a question of law and thus a specific reference. Therefore it is necessary for the appellant to show illegality.

[40] Likewise in the present appeals, the matter that was referred for arbitration relates to the construction of the agreement and is thus a question of law and a specific reference, although in the course of interpreting the terms of the agreement, the arbitrator was required to make findings of fact.

[41] A final award must be seen in its entirety and the entire facts of the case leading to the award must be taken into account to decide if there is error of law on the face of the award (*Sanlaiman Sdn Bhd v Kerajaan Malaysia* [2013] 3 MLJ 755; [2013] 2 AMR 523). Thus for the purpose of determining whether the arbitrator has committed errors of law as alleged, it is necessary to set out the salient contentions of the parties, the considerations and the findings and decision made by the arbitrator which we gathered from the final award. In the course of the submissions by learned counsel for FEH and KAOP, we were referred to the 'Appellant's Table of Errors of Law' in which was set out the various errors of law purportedly committed by the arbitrator.

INTERPRETATION OF THE AGREEMENT

[42] We wish to first deal with the submission by the learned counsel for FEH and KAOP that the arbitrator has erred in construing or interpreting the agreement. It is submitted that the arbitrator had failed to construe the parties' obligations under the agreement based on its written terms but instead relied on extraneous factors of the so-called spirit of the agreement. Therefore the arbitrator had incorrectly interpreted the agreement that the agreement contemplates that MUIP would ultimately acquire 60% of shares in KAOP. It is submitted that all that MUIP had was only an option to acquire 60% shares in KAOP, if it chooses to do so. Until that option exercise is completed, MUIP cannot be presumed to be a majority shareholder whose rights are affected by the allocation. Learned counsel conceded that if there is a capital increase, then MUIP will not hold 60% and be a majority shareholder in KAOP.

[43] We have perused the final award which shows that, in construing the agreement, the arbitrator had adopted the approach taken by the court in the case of *Bon Chong Hing @ Chong Hing & Anor v Gama Trading Co (Hong Kong) Ltd* [2011] 4 MLJ 52, a case which involved the interpretation of a shareholders' agreement. The court in *Ban Chong Hing*'s case had considered the approach as stated in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, *Weardale Coal and Iron Co v Hodson* [1894] 1 QB 598 (CA) and *The Law Land Company Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109, which is, the business common sense approach which generally favours a commercially sensible construction since a commercial construction is more likely to give effect to the intention of the parties.

[44] We find that the approach adopted by the arbitrator in construing the agreement is proper as it is consonant with case law. In fact, we are of the view that such an approach is appropriate since the dispute between the parties arose out of a commercial contract. We agree with the learned judge that the arbitrator has not committed any error of law in construing the agreement.

[45] We now turn to the substantive issues raised before the Arbitrator and his findings.

Allotment of the additional 22,096,868 shares to FEH

[46] FEH had contended that the agreement and KAOP's memorandum and articles of association do not prohibit FEH from increasing the authorised and paid up capital of KAOP. The agreement recognises that FEH would fund KAOP as it was not possible for KAOP to fund the project itself. Further it was submitted that repayment of a loan by share allotment is an accepted mechanism in commercial dealings where the debtor lacks liquidity. MUIP was

aware of this since MUIP has two representatives on the board of KAOP who were present at the board meeting on 10 April 1997 and at the AGM on 13 May 1997 and had sanctioned this exercise. It was submitted that even if there is no specific delegation by MUIP to its representatives under the Enactment, this does not exempt MUIP as a shareholder of KAOP from being bound by the conduct of its nominees in KAOP's Board. Both FEH and KAOP are separate entities incorporated under the Companies Act 1965 and are not subject to the Enactment.

[47] It is submitted that the arbitrator's acceptance of MUIP's contention that it had not given any mandate or delegated to its nominees to approve the allocation of additional shares to KAOP is misconceived amounting to a serious error of law.

[48] MUIP however contended that the allocation of the additional shares does not make any business sense and it would not have agreed to the allotment to FEH because there is no benefit for MUIP to agree to the capitalisation and conversion of the loan and accumulated interest of KAOP into share capital. On the contrary, the said exercise had adversely affected MUIP's rights and the spirit of the agreement which is for MUIP to ultimately own 60% shares in KAOP.

[49] With regard to the two officials on the board of KAOP, MUIP contended that the mere presence of these two officials in the board meeting on 10 April 1997 and in the AGM on 13 May 1997 was insufficient to amount to consent because on the date of the board meeting and the AGM, MUIP was not yet a shareholder of KAOP.

[50] The arbitrator found that there is no dispute that KAOP can increase its paid up capital so long as it is approved by its board and by its shareholders at its annual general meeting. However, the arbitrator considered cl 3.02 of the agreement which provides for the source and funding for the project and for the manner in which FEH has to raise financing to fund the project.

[51] Clause 3.02 states as follows:

Fasal 3.02 Pembiayaan Kewangan

(a) Sumber dan kewangan berkaitan dengan kemajuan Projek tersebut adalah melalui pinjaman-pimjaman yang diberikan oleh FEH ataupun KAOP kepada Syarikat Pemaju dan/atau dari pinjaman-pinjaman bank ataumana-mana institusi kewangan.

(b) FEH hendaklah mengambil langkah-langkah yang perlu bagi memohon dan mendapatkan pinjaman-pinjaman yang diperlukan bagi menjayakan Projek tersebut dari mana-mana bank dan/atau institusi-institusi

kewangan dan Majlis dengan ini bersetuju untuk membenarkan Tanah tersebut dicagarkan (bagi maksud pinjaman tersebut) kepada mana-mana bank dan/atau institusi-institusi kewangan dan bersetuju akan menandatangani semua dokumen yang berkaitan dengan pinjaman tersebut.

[52] The arbitrator found that the agreement contains no specific provision that FEH can undertake financing by way of subscribing for additional shares in KAOP. The arbitrator also noted that the reason given for the conversion of part of the loan given by FEH to KAOP through the allotment of the additional 22,096,868 shares to FEH was because of the financial burden purportedly borne by KAOP resulting in KAOP not being able to make any profit. However the arbitrator found from the documents before him (Bundles E2, E5 and E7) that KAOP had generated good income and was able to provide generous dividends to its shareholders. So KAOP would not have a problem to pay the interest on the loan given by FEH and to repay the said loan in due course.

[53] It was also the finding by the arbitrator that on the date of the AGM, FEH was the only shareholder of KAOP and owned the entire issued share capital of KAOP.

[54] With regard to Dato' Hj Abdul Muttalib bin Hj Mohd Ali Fakwie and Dato' Wan Ahmad Tajuddin bin Wan Hassan, who were nominees of MUIP on the Board of KAOP, the Arbitrator found from the records (Bundle F) that the two officials of MUIP who were nominated to be directors of KAOP were nominated to represent 'Tabies', a committee established by MUIP to manage certain financial affairs of MUIP. They were appointed to the Board of KAOP in January 1993 by FEH. At that time, KAOP was wholly owned by FEH and appointment of directors of KAOP were made by FEH. MUIP was not yet a shareholder of KAOP. MUIP became a shareholder on 19 April 1999 upon the transfer of the alienated land to MPSB.

[55] On the facts, the arbitrator found that the two officials were not representatives of MUIP at the Board meeting of KAOP on 10 April 1997 and they were also not the corporate representatives of MUIP in the AGM of KAOP on 13 May 1997 because MUIP was not yet a shareholder of KAOP. Since it was FEH and KAOP which had alleged that the two officials had consented to the additional allocation of the shares to FEH, and following the case of *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627, the arbitrator invoked an adverse inference against FEH and KAOP for not calling them to testify on behalf of FEH and KAOP.

[56] It was the arbitrator's finding that the allotment of the additional 22,096,868 shares to FEH had created a situation whereby when MUIP became a shareholder of KAOP, it would be impossible for MUIP to acquire the additional 11% and 16% of KAOP's shares via the two options and to ultimately own 60% shares in KAOP. The arbitrator found that this is, in effect, contrary to the spirit and intent of the agreement which provided for MUIP to own a majority of the issued shares of KAOP if MUIP had exercised the two options.

[57] The arbitrator opined that the actions of FEH to convert its loan to KAOP into equity in KAOP was because FEH wanted to prevent MUIP from becoming a majority shareholder in KAOP and thereby gaining control of KAOP. He found that any attempt to allocate additional shares to FEH in whatever form is a breach of the agreement by FEH and KAOP.

[58] Based on his findings, the arbitrator ordered the allotment of the additional 22,096,868 shares in KAOP to FEH to be cancelled. Damages was also awarded to MUIP for breach of the agreement.

The two options

First option

[59] The first option is provided under cll 2.02(b) and (c) of the agreement which state as follows:

> When the said Land is transferred to the Developer Company or anyone or any receiver named by FEH as an additional condition FEH hereby agrees and undertakes to offer to Majlis or anyone named a choice (option) to buy the shares of KAOP owned by FEH amounting to 3,984,501 units at the price of M$1–33 per unit that is the total price of M$5,299,386–33.
>
> The said choice (option) is opened to Majlis or anyone named (hereinafter referred to as the 'Option Holder') and binding on FEH for two (2) years starting and being effective from the date of the receipt of the approvals by the shareholders of FEH through Extraordinary Meeting, Foreign Investment Committee (FIC) relating to this joint venture and the Majlis Mesyuarat Kerajaan Negeri relating to the approval of transfer of the said Land to the Developer Company (whichever the later).

[60] FEH contended that the two year timeline provided in cl 2.02(c) for MUIP to exercise the first option was within two years after the date of the last approval was obtained. The last approval was the consent obtained from the State Authority to transfer the Lands to MPSB which was obtained on 5 October 1998. The first option period had expired on 5 October 2000 and since MUIP did not exercise the option, it is contended that the option had

lapsed. MUIP on the other hand contended that it has exercised the first option but FEH had deliberately refused to transfer the 3,984,501 shares in KAOP to MUIP.

[61] The arbitrator read cl 2.02(c) subject to cl 2.02(b) and interpreted that under cl 2.02(b), FEH must make an offer to MUIP after the alienated land is transferred to MPSB in order for MUIP to exercise the first option. The arbitrator was of the view that the dates of the approvals from the shareholders of FEH and from the FIC were matters within the knowledge of FEH and, unless MUIP was informed of these approvals, MUIP would not know the date of the last approval.

[62] The approvals referred to in cl 2.02(c) were obtained on the following dates:

(a) 23 March 1992 from the shareholders of FEH;

(b) 20 May 1992 from the FIC; and

(c) 5 October 1998 from the Land Office for consent to the transfer of the land.

[63] The arbitrator noted that MUIP had, by letter dated 2 November 1995, given notice to FEH that it intended to exercise the first option but was informed by FEH by a letter dated 12 December 1995 that the conditions stated under cl 2.02 have yet to be fulfilled. However FEH failed to inform MUIP that approval from its shareholders had been obtained on 23 March 1992 and from the EPU on 20 May 1992. MUIP sent another letter dated 21 August 1996 to inform FEH again of its intention to exercise the first option but received no reply.

[64] The arbitrator found that after the expiry of the alleged deadline of 4 October 2000, there were correspondences exchanged between FEH and MUIP and, by a letter dated 14 October 2002, FEH made an offer to MUIP to exercise the first option. This letter was signed by Nowawi bin Abdul Rahman, the Executive Director of FEH and by Noor Anisah bt Sabarudin, its company secretary.

[65] The arbitrator had rejected FEH's contention that its executive director had written the letter dated 14 October 2002 without the board's approval since the letter bore the signatures of both the executive director and the company secretary. Further the executive director of FEH had been dealing with MUIP on all matters relating to the agreement and letters to MUIP were written by the executive director. The arbitrator noted that in the letter dated 24 December 2002 signed by the executive director which cancelled the offer

under the first option, no mention was made that the letter of 14 October 2002 was sent without the Board's approval. FEH did not call the two signatories to testify.

[66] Therefore in respect of the first option, the arbitrator found that the offer made by FEH in the letter dated 14 October 2002 was lawfully made but was unlawfully revoked by the letter dated 24 December 2002. The conduct of FEH, particularly the issuance of the letter dated 14 October 2002, showed that FEH had waived its right to insist on the stipulation of time as being of the essence of the contract. The arbitrator ordered that MUIP be allowed to exercise the first option.

Second option

[67] The second option relates to cl 2.02(e) and (f) of the agreement which state as follows:

> (e) Majlis is hereby given an additional choice (option) to purchase 2,739,344 units of the share which is equivalent to eleven percent (11%) of FEH's shares with the price to be determined by all parties mentioned herein through negotiations; nevertheless the price to be agreed upon shall be based on the current evaluation of assets owned by KAOP and the developer Company on the date of the additional choice (option) is used.
>
> (f) The additional choice (option) binds FEH for three (3) years starting and effective from the fifth year after the approvals mentioned in clause 2.02(c) above are obtained.

[68] By a letter dated 1 September 2004, MUIP informed FEH that it would exercise the second option. At a meeting on 1 September 2004 between MUIP and FEH, it was agreed that the share price will be determined by a valuer appointed with the consent of both parties. By a letter dated 8 September 2004, MUIP again confirmed its intention to exercise the second option. By another letter dated 25 November 2004 MUIP confirmed that it would purchase 11% of KAIOP's shares with the value to be determined by a valuer appointed with the consent of both parties.

[69] The arbitrator found that the cut-off date to decide the value of the shares had crystallised on 1 September 2004 when MUIP notified FEH of its intention to exercise the second option. The second option would lapse on 5 October 2006 but FEH did not take any step to appoint a valuer with MUIP's consent until sometime in September 2006 when FEH appointed Aftaas Corporate Advisory Services Sdn Bhd ('AFTAAS') but without the consent of MUIP.

[70] By letter dated 28 August 2006 which MUIP received on 11 September 2006, FEH forwarded the report from AFTAAS which fixed the price of KAOP's shares at RM5.50 per share. MUIP then informed FEH by letter dated 19 September 2006 that due to the short notice and the time it needed to deliberate on the price fixed by AFTAAS, an extension was requested till 31 December 2006. FEH did not reply. It was FEH's contention that MUIP failed to exercise the second option within time.

[71] The arbitrator found that MUIP had exercised the second option on 1 September 2004 and, on 8 September 2004 at a meeting of representatives of MUIP, FEH and KAOP, it was agreed that a valuer would be appointed with the consent of MUIP. However, FEH appointed the valuer only in September 2006 and no explanation was given for the delay. The arbitrator found that the failure by FEH in appointing a valuer had prevented MUIP from exercising the second option within the stipulated time.

[72] The arbitrator found that the delay by FEH in appointing a valuer showed that the parties did not consider time is of the essence of the contract. Therefore the second option is still valid and subsisting and MUIP is entitled to exercise the second option at a price to be determined.

Valuation of KAOP's shares

[73] According to the Company Secretary of FEH, the Board of FEH had appointed AFTAAS as valuer. A witness, RW1 had also confirmed that prior to the appointment of AFTAAS, a manager of AFTAAS by the name of Shahrina Bahrin had been appointed as a director of FEH from 15 January 2004 till 27 May 2009 and was the chairman of the audit committee of FEH. MUIP contended that the only obvious reason for appointing AFTAAS was for FEH to obtain an inflated price for the shares and to frustrate MUIP from exercising the second option.

[74] MUIP had contended that the share price as valued by AFTAAS at RM5.50 per share to exercise the second option should not be accepted because the shares were valued as at 30 June 2006, and not 1 September 2004 ie the date that MUIP exercised the second option. It was FEH which had instructed AFTAAS to value the share price as at 30 June 2006. Further the report by AFTAAS was served on MUIP barely one month before the expiry date of the option period.

[75] MUIP further contended amongst others that the methodology used by AFTAAS to value the price of KAOP's shares were not suitable and were unreliable because, amongst others, the NTA (Net Tangible Asset) method to value the shares was based on the value of the shares as at 30 June 2006. For the

period from 31 December 2005 to 30 June 2006, AFTAAS had relied on management accounts provided by FEH which were not audited, and AFTAAS had depended on projections given by FEH which were unreliable. Therefore the forecast, projections and assumptions were all made by FEH, an interested party.

[76] A witness (RW2) had confirmed that the value of the shares would be different if the shares were valued as at 1 September 2004. RW2 also confirmed that the figures stated in its report as the price of the shares of KAOP was only indicative and not definitive.

[77] MUIP urged the arbitrator to reject the report by AFTAAS and to accept a report prepared by Adam & Co (appointed by MUIP) because, according to the witness CW2, it was based on the NTA method which valued KAOP's shares as at the date MUIP exercised the second option. The share price of KAOP was RM3.29 per share based on the audited accounts of KAOP as at 31 December 2004 as opposed to RM5.50 by AFTAAS which was based on valuation made in year 2006 and also on discounted cash flow and price earning methods which were not contemplated in cl 2.02(e) of the agreement.

[78] Both FEH and KAOP submitted that the report by Adam & Co ought to be rejected because the explanation by CW2 was only a general explanation and did not clearly show in detail how the price of RM3.29 per share was derived. However the arbitrator noted that counsel for FEH and KAOP did not cross examine CW2 on his valuation because they took the stand that the report by Adam & Co ought to be rejected.

[79] The arbitrator agreed with MUIP that the report by AFTAAS ought to be viewed with caution and based on the evidence given by CW2 and RW2, the arbitrator agreed with MUIP that the methods used by RW2 was unreliable and speculative. The arbitrator decided that the NTA method approach is the best approach. CW2 had used the NTA method and RW2 had also used the NTA method as one of the methods to value the shares.

[80] The arbitrator recalculated the NTA of KAOP as at 31 December 2004. Having taken into account the reduction in net asset due to the loan from FEH, the reduced share capital of KAOP as at 31 December 2004, the arbitrator arrived at the NTA of KAOP at RM5.3244 per share. Therefore the total consideration for the second option shares of 2,739,344 shares amounted to RM14,585,363.20.

Financial capacity of MUIP

[81] FEH and KAOP had alleged that MUIP had no financial capacity nor budget allocated to exercise the two options. This allegation was subsequently abandoned as can be seen from the final award (at para 25.3) where the arbitrator noted that 'the respondents accepted that the claimant had sufficient money to exercise the options and didn't proceed with the contention that the claimant had insufficient money to exercise the two options'. Notwithstanding the abandonment of the issue of MUIP's financial capacity, we noted that the arbitrator had referred to the audited accounts of MUIP including the 'Laporan Ketua Audit Negara' for Pahang for year 1999 and 2002 and the 'Sijil Ketua Audit Negara' for MUIP's accounts for the period 1995 to 2005 and found that MUIP had sufficient monies and was willing and able to take up the options.

Loss of dividends and damages

[82] MUIP claimed monetary loss which is loss of dividends declared by KAOP based on its audited accounts. FEH and KAOP took the position that loss of dividends was not pleaded and the loss claimed was in the nature of special damages which have to be specifically pleaded and strictly proved. It was contended that the failure by MUIP to plead the facts on the alleged loss of dividends as special damages is fatal and the arbitrator ought to decline on this unpleaded issue.

[83] The arbitrator found that the claim for dividends and damages was clearly spelt out in paras 24.8 and 24.9 of the statement of claim. In the two paragraphs, MUIP claims as follows:

> the damages and losses payable to the Claimant by the 1st Respondent in respect of the dividends and all other payments for the dilution of the Claimant's interest in the 2nd Respondent to 17% and for the failure on the part of the 1st respondent to transfer 16% and 11% of the shares, respectively, in the 2nd Respondent to the claimant;
>
> general damages to be assessed and paid by the 1st respondent to the Claimant;

Therefore the arbitrator found that FEH and KAOP have had sufficient notice of the relief sought by MUIP for damages and losses in respect of dividends and all other payments.

[84] The arbitrator found that as the claim for loss of dividends is a direct result of the breach, it is therefore a natural or probable consequence arising from the breach by FEH and was clearly within the contemplation of FEH. Since the audited accounts of KAOP were kept in the office of FEH, the arbitrator is of the view that both FEH and KAOP would be fully aware of the amount of dividends paid out by KAOP. Therefore if FEH was found to be liable for the breach, FEH would be fully aware of the quantum of damages payable to MUIP.

[85] The witness for MUIP, CW2 testified on the losses suffered by MUIP arising out of the issuance of the additional 22,096,868 shares and its inability to exercise the two options due to the conduct of FEH and KAOP. According to CW2, MUIP's loss of dividends for year 2002 to 2010 was RM83,381,129, after taking into account RM14,311,828 which is the cost of exercising the first and second options. CW2 was not cross-examined on this evidence and no witnesses were called to contradict CW2. The arbitrator ordered FEH to pay damages and losses payable to MUIP in respect of the dividends and all other payments for the dilution of MUIP's interest in KOAP to 17.16%, and for failure by FEH to transfer to MUIP 16% and 11% respectively of shares in KOAP.

[86] The arbitrator accepted that the loss of dividends for the period to 2010 was RM97,692,957. The total cost of exercising the first and second options was RM19,884,749. After deducting the costs of exercising the two options from the amount of dividends lost, the arbitrator ordered FEH to pay to MUIP damages amounting to RM77,808,207.80. FEH was also ordered to pay to MUIP the net dividends which MUIP should have received for year 2011 and 2012.

Interests

[87] The arbitrator was urged by learned counsel for MUIP to award interests, even though no interest was pleaded, on the ground that MUIP had been deprived of the extra dividends it would have received had it been permitted to exercise both options, and for the loss of dividends suffered by MUIP due to the additional allotment of 22,096,868 shares to FEH. It was also submitted that pre award interest could be awarded under s 74(1) and (2) of the Contracts Act 1950. FEH and KAOP on the other hand had submitted that no interest should be awarded because MUIP had not pleaded for interest and the facts on the claim for interest were not pleaded. It was further submitted that based on s 33(6) of the Act, the arbitrator has no power to award pre award interest. Additionally, FEH and KAOP contended interest is 'haram' in 'hukum syarak'.

[88] Section 33(6) of the Act states as follows:

> Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:
>
> award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and
>
> determine the rate of interest.

[89] The arbitrator is of the view that his jurisdiction to award pre award interest is based on the common law position and s 11 of the Civil Law Act 1956 which confers a discretion on the court to award pre judgment interest. Section 11 of the Civil Law Act 1956 states as follows:

> Power of Courts to award interest on debts and damages.
>
> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section:
>
> shall authorise the giving of interest upon interest;
>
> shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

A shall affect the damages recoverable for the dishonour of a bill of exchange.

[90] Having considered the case authorities and the submissions made, the arbitrator awarded MUIP pre award interest at 4%pa. Based on s 33(6) of the Act, the arbitrator awarded post award interest also at 4%pa.

B

OUR DECISION

[91] We have produced substantially the decision made by the arbitrator and his findings based on the evidence presented before him. It is apparent that, as correctly found by the learned judge, the decision of the arbitrator on the substantive issues are based on findings of fact from the evidence, oral and documentary, that were produced before him.

C

D **[92]** We have earlier stated that we do not find the arbitrator's approach in interpreting the agreement illogical or perverse. The arbitrator has interpreted the agreement and found that it was the contemplation of the contracting parties that ultimately, MUIP shall own 60% shares in KAOP after having exercised the two options. The agreement also shows that the contracting E parties did not contemplate any change in the paid up capital or authorised capital of KAOP. Hence, the agreement made no provision for such event. Therefore, any such change subsequent to the execution of the agreement ought to be with the consent of the contracting parties, particularly when such change will have an adverse consequence on any one of the contracting parties, F as is the case in this present appeal. In fact, learned counsel for FEH and KAOP conceded in his submissions that the increase in the paid up capital and authorised capital of KAOP would result in MUIP being deprived of the opportunity of acquiring 60% shareholding in KAOP. This concession by learned counsel underscores the need for MUIP's consent before any change in G the paid up capital and authorised capital structure of KAOP is implemented. The decision of FEH made without the knowledge or consent of MUIP had thrown into disarray the intention underlying the agreement that ultimately, MUIP will own 60% shares in KAOP.

H

[93] The arbitrator had found no specific provision in the agreement that FEH can undertake financing by way of subscribing for additional shares in KAOP. We are unable to agree with learned counsel for FEH and KAOP that, because there is nothing in the agreement that prohibits both FEH and KAOP I from increasing the paid up capital and authorised capital of KAOP and because both FEH and KAOP are separate legal entities incorporated under the Companies' Act 1965, therefore both are at liberty to increase the authorised and paid up capital of KAOP. We are of the view that although FEH and KAOP may increase their authorised and paid up capital, such action has to be

circumscribed by any legal or contractual restraints or obligations that they may have with third parties. We find that the arbitrator has correctly acknowledged this in the final award.

[94] On the issue of the value of KAOP's shares, the arbitrator had assessed the evidence before him including the testimonies of witnesses and had decided that the NTA method is the best approach. This decision was because both CW2 and RW2 had used the NTA method as one of the methods to value the shares.

[95] We find no ground to intervene with the arbitrator's construction of the agreement or in his approach to assess the value of KAOP's shares. We are guided by the case of *The Government of India v Cairn Energy India Pty Ltd & Anor*, wherein Richard Malanjum CJ (Sabah and Sarawak) said (at p 448):

> We note that the arbitrators were faced with a question on the construction of a clause in an agreement. From the reading of it, no doubt it could be given two interpretations — one in favour of the appellant and one in favour of the respondents. For that very reason, the matter was sent for arbitration. *The fact that the learned majority arbitrators took one approach in interpretation (which was in favour of the respondents) over the other cannot be a ground for challenge.* (Emphasis added.)

[96] On the issue of damages and losses claimed by MUIP, the arbitrator found that the relief of damages and losses payable by FEH to MUIP was pleaded in paras 24.8 and 24.9 of the statement of claim and that both FEH and KAOP were aware of this. With regard to the amount of dividends lost by MUIP, we find that the arbitrator has not committed any error in law when he decided to accept the uncontradicted evidence of CW2 on this issue.

[97] We have perused the final award in its entirety and we find that it is clear that in making his decision on the matters referred to him, the arbitrator had considered the evidence adduced before him, both oral and documentary, and also the submissions made by learned counsel for the parties and he had made definite findings upon those evidence. We do not find that the findings are perverse or illogical. We are unable to agree with learned counsel for FEH and KAOP that the final award is manifestly unlawful and unconscionable, or perverse, or that there is any error of law committed by the arbitrator, except on the award of pre and post award interest.

[98] On the issue of interests, we agree with the learned judge that the Arbitrator has erred in law in awarding pre and post award interests. Having considered the Act, we find that under s 33(6), the Act has made specific provision for post award interest, but does not provide for pre award interest. Clearly the Act does not contemplate the awarding of pre award interest. We

agree with the submissions by learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre award interest, then implicitly the Legislature did not intend to confer on an arbitrator the power to award pre award interest. Therefore we agree with the learned judge that the award of pre award interest ought to be set aside.

[99] With regard to post award interest, it is not disputed that MUIP had not pleaded for such interest either in the statement of claim or in the originating summons filed at the High Court. We are of the view that in the absence of any prayer for interest, which learned counsel for MUIP must be taken to be aware of, the arbitrator ought not to have awarded post award interest. We agree with the submissions by learned counsel for FEH and KAOP that parties must be bound by their pleadings. The learned judge is correct in setting aside the post award interest.

CONCLUSION

[100] Upon a perusal of the entire final award, we agree with the learned judge that the arbitrator had made his decisions based on his findings of fact which we find are neither illogical nor perverse. We respectfully agree with Nallini J in *Exceljade* wherein Her Ladyship said, inter alia, ' ... the courts are to be constantly vigilant to ensure that attempts to question the arbitrators' findings of fact are rejected ... '

[101] For the reasons stated above, we affirm the decision of the High Court and dismiss all the three appeals with costs. In respect of Appeal 2672, we award costs of RM50,000. We make no order on costs in respect of Appeals 2671 and 2781. The deposits paid are to be refunded.

Appeals dismissed with costs.

Reported by Kohila Nesan